In the Supreme Court
of the United States

OCTOBER TERM 1975

No. 75-566

SHIRLEY ANNE DANLEY,
TERRY LEE MEIDEL, and
ROY EARL OSWALT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Shirley Anne Danley, Terry Lee Meidel and Roy Earl Oswalt respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on September 19, 1975.

OPINION BELOW

Opinion of the Court of Appeals is not yet reported (Appendix p. A-1). The District Court gave no opinion.

JURISDICTION

The jurisdiction of the District Court for the District of Oregon was founded on 18 U.S.C. § 3231. The jurisdiction of the Court of Appeals was founded upon 28 U.S.C. § 1291.

The judgment of the Court of Appeals was entered on September 19, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where Oregon law legalized publication of explicitly sexual material (except to minors or in a public place for advertising purposes), does this establish a legislative community standard for the District of Oregon which would make this permissible in a Federal prosecution?

2. Are the fines levied against Danley and Meidel, in light of their financial situation, excessive under the Eighth Amendment, United States Constitution?

Constitutional Provision Involved

Eighth Amendment, United States Constitution

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statutory Provisions Involved

Since the petitioners and the Government stipulated to the doing of the acts charged in the indictment within the Federal statutes except the "obscenity of materials which term is defined by decisions of the Court, the terms of the United States statutes involved will be omitted.

The Oregon law involved is in the negative, only making illegal publication of certain material to minors or in a public place for minors (ORS 167.060 to 167.100), so the terms of these excepted materials will be omitted also. It might be noted that even this limited statute was held invalid by the Oregon State Court of Appeals and no review sought by the State. *State* v. *Cardwell/Freeman*, — Or. App. —, — P.2d —, 75 Adv. Sh. 2829 (1975).

Statement of the Case

Petitioners, together with Tracy William Gann, were indicted in a multicount indictment under various Federal statutes with interstate shipment of obscene material (18 U.S.C. §§ 1461, 1462, 1465) and conspiracy to do so (18 U.S.C. § 2). All pled not guilty, stipulated to all elements of the offenses charged except for the question of obscenity of the materials, waived trial by jury and were jointly tried.

The material published by defendants was assembled from other materials published nationally and obtained from local adult bookstores. Publication, sale, possession, etc., of this material was all legal in Oregon both at the times defendants did the acts charged and at the time of trial. It depicted for the most explicit sexual activity.

The trial judge also viewed as comparable material portions of the movies "Deep Throat", "Devil in Miss Jones" and "Behind the Green Door", playing in Portland, Oregon movie houses and showing all forms of explicit sexual activity.

All were convicted. Defendants Danley and Meidl were each sentenced to 18 months' imprisonment and $15,000 fine. Defendant Oswalt was sentenced to 6 months' imprisonment and 4½ years' probation thereafter. Gann received probation. Danley, Meidel and Oswalt appealed to the United States Court of Appeals for the Ninth Circuit, Gann did not. The appeals were consolidated, Danley and Meidel filed a single brief, Oswalt was allowed to adopt it as his. A single argument was offered for all three appellants, and one opinion rendered. Meidel and Oswalt would probably qualify as poor persons, But Danley would not. A single petition is offered on behalf of all three.

REASONS FOR GRANTING THE WRIT

With its rejection of the national standard suggested in *Jacobellis* v. *Ohio*, 378 U.S. 184, 192-195 (1964), of necessity a lesser standard must apply.

The community standard is that of the forum, the District of Oregon in this case, co-terminous with the State of Oregon. *Hamling* v. *United States*, 418 U.S. 87, —, 94 S. Ct. 2887, 2901-2902, 41 L. Ed. 2d 590, 613-614 (1974). No evidence of another standard was offered or even suggested. Since the people of Oregon through their Legislative Assembly have established

the standard as complete tolerance of explicit sexual material for consenting adults, under such circumstances this material is not obscene and the convictions of defendants was erroneous.

Often State law governs the application of terms in a Federal statute. *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *Wadman* v. *Immigration and Naturalization Service*, 9 Cir. 329 F.2d 812 (1964).

The situation in Oregon under its statutes would apply equally to Hawaii (Penal Code T 37 § 1212 to 1216, Laws 1973 c 136 § 10 applying to minors only), and Alaska (Statutes 11.40.160 to 190 applying to comic books only).

The *Eighth Amendment* provides:

> "Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishmentment inflicted."

In light of the limited financial resources of defendants Danley and Meidel, reflected in the financial statements in the sealed pre-sentence reports, the fines of $15,000 on each would strip them of everything, exactly the thing that motivated this provision in the *English Bill of Rights. cf. People* v. *Staffore*, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).

It cannot be foreclosed by a reference to "discretion" because its application was intended to forbid just such discretion.

A position on this question by this Court would appear warranted.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Howard R. Lonergan
Counsel for Petitioners.

APPENDIX

OPINION OF THE COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SHIRLEY ANNE DANLEY,
aka Ginger Cardwell, and
TERRY LEE MEIDEL,
Defendants-Appellants.
No. 75-1789

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROY EARL OSWALT,
aka Jimmy Collins,
Defendant-Appellant.
No. 75-1948

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Before: KOELSCH and TRASK, Circuit Judges, and SMITH*, District Judge

SMITH, District Judge.

Defendants were charged with violations of 18 U.S.C. §§ 1462 and 1465 relating to obscenity, and with conspiracy to violate those sections. They were tried by the court and found guilty. The facts were

* The Honorable Russell E. Smith, Chief Judge of the United States District Court for the District of Montana, sitting by designaion.

stipulated, reserving only the question of whether the materials described in the indictment were obscene.

The trial court expressly found that the materials were obscene under the rule of *Miller* v. *California*, 413 U.S. 15 (1973), and even under the Stricter rule announced by the plurality in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). The questions presented by the appeal are whether, in view of the state of Oregon law at the time of the offenses, it was permissible for the court to find that the material affronted contemporary community standards and whether the fines levied were excessive.

The then Oregon law did forbid the furnishing, sending, or displaying of obscene materials to minors and did forbid the use of nudity or sex advertising (Oregon Laws ch. 743, §§ 255-262a (1971)), but did not forbid the sale and distribution of obscene materials to adults. Defendants urge that these laws fixed the community standard for Oregon and that the Oregon standard controls.

The trial court concluded that the fact pornographic material was available because of the relaxation of criminal statutes in Oregon did not make that pornography acceptable according to contemporary community standards. The trial court objectively considered standards in the State of Oregon and in the states in which there were recipients of the materials transported and found that the average person, applying contemporary community standards, would find that those materials appealed to the prurient interest.

We deal with a federal law which neither incorporates nor depends upon the laws of the states. *United States* v. *Hill*, 500 F.2d 733 (5th Cir. 1974). Rather, the federal law depends for its constitutionality upon definitions incorporating community standards. Community standards are aggregates of the attitudes of average people — people who are neither "particularly susceptible or sensitive . . . or indeed . . . totally insensitive." *Miller* v. *California*, *supra*, at 33. The fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a person of fact to be resolved by the trial court, and in this case, the trial court did resolve it.

In judging the community standard, the court, dealing as it was with laws regulating the mails and interstate commerce, properly considered the community as embracing more than the State of Oregon. While under *Miller* v. *California*, *supra*, taken in conjunction with *United States* v. *12 200-Ft. Reels of Super 8 MM. Film*, 413 U.S. 123 (1973), it is permissible in federal prosecution to define the state as a community, it is clear from *Hamling* v. *United States*, 418 U.S. 87 (1974), that consideration may be given to standards without the state. *United States* v. *Harding*, 507 F.2d 294 (10th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3514 (U.S. Mar. 24, 1975); *United States* v. *Miller*, 505 F.2d 1247 (9th Cir. 1974).

Appellants Danley and Meidel assert that the $15,000.00 fines imposed against them were excessive un-

der the eighth amendment. The court could have fined Daney $65,000.00 and Meidel $40,000.00. The trial court has a wide discretion in the imposition of sentences (*United States* v. *Kohlberg*, 472 F.2d 1189 (9th Cir. 1973)), and we are unable to say that there was an abuse of it.

The judgments of conviction are affirmed.

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. SHIRLEY ANNE DANLEY, aka Ginger Cardwell, and TERRY LEE MEIDEL, *Defendants-Appellants.*	No. 75-1789
UNITED STATES OF AMERICA, *Plaintiff,Appellee* v. ROY EARL OSWALT, aka Jimmy Collins, *Defendant-Appellant.*	No. 75-1948

APPEALS from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 19, 1972.

No. 75-566

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SHIRLEY ANNE DANLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

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SHIRLEY ANNE DANLEY, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that federal law cannot prohibit the distribution of material that is not obscene under state law and that the fines imposed by the district court were excessive.

Following a non-jury trial in the United States District Court for the District of Oregon, petitioner Danley was convicted of eleven counts of interstate transportation of obscene materials by common car-

rier, in violation of 18 U.S.C. 1462. Petitioner Meidel was convicted of three counts of interstate transportation of obscene materials by common carrier, in violation of 18 U.S.C. 1462, and three counts of interstate transportation of obscene materials for purposes of distribution and sale, in violation of 18 U.S.C. 1465. Petitioner Oswalt was convicted of three counts of interstate transportation of obscene materials by common carrier, in violation of 18 U.S.C. 1462, and four counts of use of the mails to ship obscene materials, in violation of 18 U.S.C. 1461. All three petitioners were convicted of conspiracy to distribute obscene materials, in violation of 18 U.S.C. 371. Petitioners Danley and Meidel were sentenced to 18 months' imprisonment and fined $15,000. Petitioner Oswalt was sentenced to concurrent terms of six months' imprisonment, to be followed by four and one-half years' probation. The court of appeals affirmed (Pet. App. A1-A4).

1. The facts were stipulated. The only contested issue was whether the publications are obscene (Pet. App. A1-A2). Petitioners contend that the publications are not obscene because at the time of the trial Oregon had no criminal laws prohibiting the distribution of sexually oriented materials to consenting adults. This establishes as a matter of law, petitioners argue, that in Oregon the contemporary community standards were not offended by any materials, however explicit. If that is so, the argument concludes, then under the standards of *Miller* v. *California*, 413 U.S. 15, any federal prosecution must fail.

The upshot of petitioners' argument is that federal laws cannot be more restrictive of obscenity than the state laws in the jurisdiction in which the trial takes place. This argument is incorrect. A federal prosecution for obscenity neither incorporates nor depends upon state laws. *United States* v. *Hill*, 500 F.2d 733 (C.A. 5), certiorari denied, 420 U.S. 952. Since obscene material is not protected under the First Amendment (*Roth* v. *United States*, 354 U.S. 476) and the federal government has a legitimate interest in preventing such material from entering the stream of interstate commerce (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-64), patently offensive materials are subject to regulation notwithstanding the absence of a state law prohibiting their distribution. *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123; *United States* v. *Orito*, 413 U.S. 139; *United States* v. *Reidel*, 402 U.S. 351.

The availability of obscene material in Oregon because of the relaxation of its criminal statutes does not imply community acceptance. *United States* v. *Manarite*, 448 F.2d 583 (C.A. 2), certiorari denied, 404 U.S. 947).[1] It indicates only that the State has

[1] Indeed, the Oregon statutes in effect at the time these offenses were committed have since been amended. In November 1974 the voters of Oregon approved a statute prohibiting the distribution of obscene materials to consenting adults.

not chosen to impose criminal penalties for conduct of this sort, whether or not the conduct offends contemporary community standards. Whether certain publications affront contemporary community standards is a question for resolution by the trier of fact. As the court of appeals properly concluded (Pet. App. A2):

> The trial court objectively considered standards in the State of Oregon and in the states in which there were recipients of the materials transported and found that the average person, applying contemporary community standards, would find that those materials appealed to the prurient interest.[2]

2. Nor were the $15,000 fines imposed on petitioners Danley and Meidel excessive. These fines were well within the statutory limits.[3] That being so, appellate review of their severity is not available.[4] *Dorszynski* v. *United States*, 418 U.S. 424.

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[2] Although this Court in *Miller* v. *California*, 413 U.S. 15, rejected the view that a uniform national standard is constitutionally required, it did not hold that a specific smaller geographic area always is required. The district court here properly considered the standards of the communities into which the materials were sent as well as the standards of the forum of the trial. Cf. *Hamling* v. *United States*, 418 U.S. 87.

[3] Petitioner Danley could have been fined $65,000. Petitioner Meidel could have been fined $40,000 (Pet. App. A4).

[4] A fine of $15,000, while severe, is not cruel and unusual. The fine will be less onerous than the 18 months of imprisonment to which petitioners Danley and Meidel also have been sentenced. Petitioners have not argued that they are unable to pay the fines. Nor would petitioners be incarcerated on account of any inability to pay. See 18 U.S.C. 3569.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 598527 144